Filed 7/22/16 In re J.S. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re J.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. J.S., Defendant and Appellant.	A144728 (Solano County Super. Ct. No. J41197)

INTRODUCTION

This timely appeal is from the juvenile court's order committing 18-year-old appellant J.S. to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF) (formerly known as the Department of Juvenile Justice (DJJ)) for a maximum term of either eight years four months or seven years four months. Appellant contends it should be six years. This disposition followed jurisdictional findings of robbery, aggravated assault, attempted robbery and receiving a stolen motor vehicle. (Pen. Code, §§ 211, 245, subd. (a), 664/211, 496d, subd. (a).)[1] Appellant argues the jurisdictional findings are not supported by substantial evidence, the juvenile court abused its discretion in ordering a DJJ commitment, and the court should correct the

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

minute order. We will order the JV-732 form corrected to reflect a maximum term of seven years four months. In all other respects, we affirm.

COMBINED STATEMENT OF THE CASE AND FACTS

Prior Petitions

First Wardship Petition

Appellant first came to the attention of the juvenile court when he was 14 years old. On November 23, 2011, appellant brandished a loaded firearm during a verbal altercation. A wardship petition (Welf. & Inst. Code, § 602) alleged appellant was a minor in possession of a firearm, a felony. (Former § 12101, subd. (a)(1).)[2] Appellant admitted the allegation and was placed on deferred entry of judgment (DEJ) probation.

On January 31, 2012, appellant stole an iPod from another student at school. The original petition was amended to add one count of grand theft person (§ 487, subd. (c)). Appellant admitted violating DEJ and the pending petition was dismissed. The court subsequently adjudged appellant a ward of the court, terminated DEJ, and placed appellant on formal home probation.

On August 1, 2012, a notice of hearing to modify probation (Welf. & Inst. Code, § 777) was filed alleging that appellant failed to drug test on one occasion and twice tested positive for marijuana. Appellant admitted the probation violation and was placed at New Foundations, probation's drug treatment program. He successfully completed the program on January 7, 2013.

Second Wardship Petition

On May 25, 2013, appellant was observed in the company of a minor he was prohibited from contacting by his probation conditions. Brass knuckles wrapped in red tape were found in appellant's pants pocket when he was taken into custody for the

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[2] Section 12101 was repealed in 2010 but remained operative until January 1, 2012. (Stats. 2010, ch. 711, § 4, p. 4138.) Now see sections 29610 and 29700. (Added by Stats. 2010, ch. 711, § 6, pp. 4269, 4270, operative Jan. 1, 2012.)

probation violation. Appellant was also wearing red apparel indicative of gang affiliation.

A second wardship petition alleging felony possession of metal knuckles (§ 12810) was filed on May 28, 2013. On June 4, 2013, appellant admitted the brass knuckles allegation as a misdemeanor. On June 18, 2013, the court reinstated formal probation on the condition, among others, that appellant return to New Foundations. Appellant completed the program on October 18, 2013.

On April 21, 2014, appellant "was observed tampering with a car door." When the district attorney declined to file an attempted burglary charge, a Welfare and Institutions Code section 777 petition alleging a probation violation was filed. Appellant failed to appear in court for his annual review and arraignment on the Welfare and Institutions Code section 777 petition, and a bench warrant issued.

Third Wardship Petition

A third wardship petition alleged that on June 4, 2014, appellant took and drove a Honda Civic and evaded a pursuing officer, both felonies (Veh. Code, §§ 10851, subd. (a), 2800.2, subd. (a)). On that day, police observed appellant and another person in a car that had been reported stolen. The driver was wearing a large black hooded top and the passenger was slouched down in the seat. A short chase by police ended when the car crashed into a motor home and appellant, wearing a black hood, ran from the scene. After he was apprehended, the police found a shaved key in the ignition. A record check revealed the warrant. Appellant denied he was the driver; he said he met the driver at a skate park and got into the car; he did not know the car was stolen.

On June 12, 2014, the wardship petition was amended to add a third count, that appellant made criminal threats, a serious felony (§§ 422, 1192.7, subd. (c).).

On June 24, 2014, appellant was arraigned on count 3; counts 1 and 2 were dismissed for lack of sufficient evidence. On July 15, 2014, count three was dismissed

by the prosecutor. The entire third wardship petition and the Welfare and Institutions Code section 777 petition were dismissed by the court on July 29, 2014.

Current Petition

Appellant's fourth wardship petition alleged that on October 18, 2014, appellant, then age 17, and two adults robbed M. H. (count 1) and assaulted him with a deadly weapon, a knife, and by means of force likely to produce great bodily injury (count 2). (§§ 211, 245, subd. (a)(1).) Both counts were alleged as serious felonies. (§ 1192.7, subd. (c).) The petition was subsequently amended to add two counts alleging that on the same day, October 18, 2014, appellant attempted to rob J. R. (count 3) (§§ 211/664), and appellant received stolen property, a stolen Honda Accord (count 4) (§ 496d, subd. (a)). The juvenile court sustained all four counts of the wardship petition after a contested jurisdictional hearing. Following a contested dispositional hearing, the court continued appellant's wardship and committed him to the DJJ for six years, with credit for 379 days in custody. The court set appellant's maximum term of commitment at eight years four months.

Facts Related to the Current Petition

Counts 1 and 2

At 5:00 a.m. on Saturday, October 18, 2014, Cinamon Mattson was taking a cigarette break in the parking lot of the Walmart Neighborhood Market in Vacaville where she worked the night shift, when M.H., a local transient, approached her and asked for help. According to Mattson, M.H.'s "face was messed up. It was badly beaten. [¶] . . . [¶] His eye . . . was badly hit." M.H. had "blood on his hands and blood on his leg." She said M.H. "startled" her and "took [her] by surprise" when he walked up to her. It made her feel "[v]ery uncomfortable."

Mattson called 911.[3]

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[3] The following exchange took place:

"911, what is your emergency?

"Yeah, someone got stabbed.

"Where at?

"At 2050 Nut Tree Road. It's Walmart. Our Neighborhood Market.

"Okay. Where is the person now?

"He's . . . sitting on the sidewalk right here.

". . . Do you know what happened?

"[¶] . . . [¶] "

"Is he unconscious?

"No, he's conscious, but he's bleeding.

"How bad is the stab wound? How deep is it?

"[¶] . . . [¶]

"He doesn't know. He's sitting covered up.

"Okay. Did he see the person that hit him?

"Yes, he did.

". . . Can he describe the people at all?

"Can you describe the people who . . . jumped you?

"Mexicans; [h]e says, three.

"Three of 'em?

"Three young Mexicans.

"Okay. And description of their clothing or anything like that, or which way they went?

"VICTIM: *They went that way. They were young kids.*

"STORE CLERK: They went towards the hospital, like towards that way and down that street.

"[¶] . . . [¶]

"They were walking, yes.

"Okay. Any clothing description at all? . . .

"STORE CLERK: Any clothing that they were wearing?

"VICTIM: *One had on a black shirt. I don't even need to give a description. Am I going to die out here?*

"[¶] . . . [¶]

". . . The ambulance is coming.

"Two were skinny. One was heavy-set. One had a black shirt; one was wearing a white shirt.

"Okay. So two were skinny, and one was heavy-set.

"[¶] . . . [¶]

"And the one with the dark shirt had long hair.

"One wearing a dark shirt with long hair?

"He had long hair, yeah.

"[¶] . . . [¶]

"STORE CLERK: Sorry that happened to you. I feel really bad for you, man.

"They said they know where he sleeps at and they're going to come back and get him or something.

"[¶] . . . [¶]

"How bad is the bleeding and where is the injury?

"(Unintelligible) Where's that one stab wound in the back by your kidney right there? [¶] Yeah, and one in his hamstring on his leg. [¶] (Unintelligible.)

"[¶] . . . [¶]

"Yeah. One's on the back of 'em, from, you know, his backside. And he got punched in the eye pretty bad. It's swollen and everything."

"[¶] . . . [¶]

"And what did he take from him? . . .

"They took all—they took all his money.

"How much? Was it, like, cash?

"Yeah. [¶] How much money did you have on you? [¶] He doesn't know. It was his can money, um, recycling money.

"[¶] . . . [¶]

"Was it change or dollars or what?

Officer Donald McCoy was dispatched to the scene at 5:11 a.m. M.H. was lying on his back on the sidewalk in front of Walmart. He had blood on his hands and appeared to be in pain. When paramedics removed M.H.'s shirt, McCoy could see a stab wound, one-half to three-quarters of an inch wide, in the lower left portion of M.H.'s back. McCoy video-recorded the stab wound with his body recorder.[4]

Officer Nichole King saw a stab wound to M.H.'s left back thigh and numerous injuries to his face, including an eye that was swollen shut, as well as the stab wound to the back. The victim described his assailants to her as three Hispanic males, two thin and one heavyset.

Officer King secured and watched surveillance tapes for the hour between 4:00 a.m. and 5:00 a.m. from a nearby 7-Eleven Store.[5] Reviewing the video in court, King identified M.H., unharmed, at 4:53:30 a.m. She identified appellant, D.A., and Daniel Ortiz at 4:53:33 a.m. She testified D.A. is seen on the video removing what appears to be a knife from his front pants pocket, followed by the shine of the knife

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"He doesn't know. He's sitting there shaking. He's cold.

"[¶] . . . [¶]

"Can I get your name?

". . . He wrapped it in a shirt.

"He has it wrapped up? Okay. He needs to keep it tight and pressed down so that there's no—so it stops the bleeding. [¶] What was your name?

"My name is Cinamon. [¶] . . . [¶] And I work right here at this Walmart.

"[¶] . . . [¶]

"I was on my break, and he came walking up to me. The cops are here now." (Italics added.)

The taped call was transcribed by the court reporter. Ms. Mattson identified her voice on the tape.

[4] The video recording was admitted into evidence, as were photographs of M.H.'s face and stab wounds.

[5] This video recording was admitted into evidence.

blade, at 4:53:34 and 4:53:35 a.m. on the video recording.[6] The attack was not captured by the video. The three suspects were wearing the same clothing in the 7-Eleven store they were wearing when they were arrested shortly thereafter.[7]

Counts 3 and 4

Between 6:00 a.m. and 6:30 a.m. that same morning, J.R. was finishing his morning jog and was nearing his apartment on Summerfield Drive in Vacaville when a green, four-door Honda with one headlight drove alongside him, very close. A skinny young Mexican wearing a hat (later identified as D.A.) was sitting in the back seat. J.R. identified appellant, who had longer hair, as the driver. Both D.A. and appellant demanded to know how much money he had. Their voices were "threatening," as if they were trying to rob him. D.A. said, "Do you want them thangs in you?" and pulled up his

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[6] The manager of the 7-Eleven store who installed the video cameras testified the date stamp was accurate, although the time stamp "can be a couple of minutes off here and there."

[7] The video recording and appellant's booking photographs were admitted into evidence.

The court has viewed the video. At 4:50:45 a.m. three figures appear from the left side of the frame and move towards the middle of the frame, where the gas pumps are located, then continue moving towards the upper right frame and out of view at 4:51:30. At 4:52:49 they come back into the frame from the upper right corner and walk toward the middle of the frame, just as a single figure appears from around the corner of a building at the upper left-hand side of the frame. At 4:53:19 the three figures speed up to meet up with the single figure (M.H.) at the pumps. At 4:53:26 the three figures are following the single figure with appellant, in a black jacket, closest to M.H. D.A., in a white vest and white shoes, is behind appellant. At 4:53:28 all four walk in a single file almost out of the frame at the bottom left corner, but then start to circle back. At 4:53:31 M.H. quickly turns to face appellant with his hands up in front of his face in a boxing stance. In reaction, appellant puts his hands up in boxing stance, but quickly puts them back down again. The three youths spread out and encircle M.H., who is dancing around with his hands still up around his face. At 4:53:34 and 4:53:35 D.A. pulls something out of the front of his pants; it flashes, then D.A. puts it in the back of his pants as appellant and the other two follow M.H. out of view at the bottom left side of the frame at 5:53:39 a.m.

shirt. J.R. saw what he believed was the handle of a gun in D.A.'s waistband. When the suspects were distracted by almost hitting a parked car, J.R. "took off running" because he thought they might shoot him.

J.R. ran to his apartment complex, hopped in his car, which was parked there, and immediately called 911.[8] He identified himself and said two Mexicans, a "skinny" one in the back of a "little green Honda" and a "fat" one in the front, tried to rob him. It looked as if one of them had a knife or a gun. He described what happened as "the shock of my life."

A "be-on-the-lookout" dispatch was broadcast about a green four-door Honda, with one headlight, which had just been involved in an attempted robbery. Three Vacaville patrol cars pursued the Honda. Officer King saw that the car had three Hispanic males in it, two in the back and one in the driver's seat. At 6:30 a.m. the Honda crashed into a tree in front of the apartment complex on Summerfield Drive where J.R. was waiting for the police. King's patrol car collided with the trunk of the Honda.

The Honda's driver, later identified as Ortiz, fled the car through the front passenger side door. Ortiz was searched after he was taken into custody. He had $38 in bills of different denominations in his wallet. J.R. saw Ortiz run from the car into the apartment complex and described him as "real tiny, real skinny" with a "little Afro." He did not see Ortiz during the attempted robbery.

Appellant and D.A. were removed from the back seat of the Honda. Appellant was searched; a $20 bill and a shaved key were found his pocket. D.A. was also searched; a small folding knife was found in his pocket.

At trial, J.R. indicated he identified D.A. at the scene as the person in the back seat who asked for money and appeared to have a gun in his belt; he told police appellant

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[8] Parts of the call were admitted into evidence.

"was driving and doing the talking in the front seat . . . ." J.R. testified he was "a hundred percent sure" appellant was the driver of the Honda at the time of the attempted robbery.

According to Officer Aaron Potter, J.R. was only able to identify D.A. as the suspect who asked him for money and threatened him with what he believed was a handgun. The victim told Potter "he didn't get a good enough look at [the driver] to be able to positively identify who was driving the car." "[H]e told me that he knew there was other occupants in the vehicle, but he didn't get a good look at them, and he didn't feel comfortable making ID on the subjects who were there, as to which one was driving."

At the time, there was a crowd of about 20 to 40 people from the apartment complex where J.R. lived. Some of the spectators were the suspects' family members. One female in particular was the sister or cousin of one of the suspects. She was "being kind of vocal" and was told by police to be quiet. Potter testified J.R. "could have been holding back when I was speaking with him" because those family members were nearby. He did not recall J.R. saying anything about Ortiz. Potter also acknowledged the victim had talked to another officer at the scene before he talked to Potter.

Officer King interviewed appellant at the police station and showed him a still photograph from the 7-Eleven surveillance video showing all three suspects. Appellant identified himself in the photograph but refused to identify D.A., who is appellant's nephew.[9] Appellant told King he had been drinking, but "[n]ot too much." A girl he was visiting got him a ride home with a person he had just met named Lorenzo. He was told to "hop in the back." During the police chase, Lorenzo threw a $20 bill at him. Appellant slapped his glasses off during the car chase.

[9] The tape recording and transcript of Officer King's interview with appellant were admitted into evidence.

Appellant adamantly denied stabbing anyone. However, after the officer showed him some of the surveillance video, appellant asked: "The one where the bum disrespected us? And then we kept on talking to him, like what do you mean? What do you mean? And then he was like, he tried to take off on us." Appellant maintained he was drunk and did not remember anything, except "this guy offered us weed and us asking him for weed. And the next thing you know, it's all fucking kung fu shit." A little while later, appellant elaborated: "I remember him offering . . . people weed, right? . . . I got some weed for sale. The next thing you know, like he was talking about, oh, he's not going to sell to us because we're bitches, blah blah, something something. And then he started . . . doing some hong kong fu shit." And then he threw something." Appellant admitted his nephew Daniel was with him, but claimed he did not know the third person, named Dang, who was not Lorenzo the driver. He said the bum threw a bottle at them.

The owner of the green Honda testified his car was stolen on the night of Thursday, October 16, 2014. No one other than his son had permission to drive the car.

There was no key in the ignition when Officer Bedi Lopez processed the stolen car. Officer Michael Ambrose testified shaved keys are used to start stolen vehicles. Officer King testified that in her experience with about 50 shaved key cases, when a shaved key is pulled out of the ignition, the engine could continue running.

Prior Similar Conduct

On June 4, 2014, at about 9:00 p.m., Fairfield Officer Michael Ambrose followed a Honda that had been reported stolen. The driver was wearing a big puffy black jacket and hood and someone was slouched down in the front passenger seat. The car sped away and eventually crashed. By the time Officer Ambrose reached the car, its occupants had fled the scene. Officer Welter found appellant, wearing a puffy black jacket, half a block from the car crash. There was a shaved key in the ignition. Appellant admitted being in the car. He said a guy he met at a skate park, whose last name he did not know, gave him a ride; he did not know the car was stolen, and he was not the driver.

Defense Case

Two police officers testified that appellant displayed signs of intoxication after his arrest. Appellant told one of the officers he was a passenger in the Honda and did not know the driver.

G.C., age 22, is appellant's niece and D.A.'s sister. She testified appellant and D.A. were at her apartment drinking the night of Friday, October 17. Appellant was "sloppy" intoxicated. He and D.A. were at her apartment between 3:00 a.m. and 6:30 a.m., when they left. The next time she saw them, they were in front of the apartments. The police were pulling her brother out of the right-hand side of the back seat of a car, and pulling her uncle from the left-hand side of the back seat of the car.

Appellant testified in his own behalf. The night of October 17 he drank "a little bit" of Hennessey with soda and "a little bit" of beer. He went to a party and had more beer. He had a $20 bill. He threw up on a curb. He argued with his niece. He did not remember being with D.A. or Ortiz. He remembered a homeless man doing "some kung fu thing, and then from that, like, I can't really remember." He did not remember hitting the man. He did not intend to take anything from him or hurt him. He did not intend to help anyone else hurt him or take something from him. He did not remember witnessing a stabbing. He did not recall helping someone else to stab somebody. He did not know where he went next. He was hung over for two days. He got mad when the police accused him of stabbing someone because he had been stabbed before and he would not do that.

He remembered falling asleep in the back seat of a car and the car crash. He did not drive the car at any time that evening "that [he] can remember." He did not know who was driving. He did not recall how a shaved key got in his pocket; he did not know the car was stolen.

Prosecution Rebuttal

After D.A.'s arrest, G.C. called Detective Chris Lechuga to report she observed from her balcony as appellant, D.A. and Ortiz walked to the 7-Eleven. An older man initiated a confrontation, after which only Ortiz "got into a fight" with him. However, G.C. would not let the detective into her apartment to confirm the view from her balcony, and she made it clear to the detective she would only answer his questions if they helped her brother. G.C. also told Lechuga neither appellant nor her brother had been drinking alcohol in her apartment that night.

DISCUSSION

I. Substantial Evidence Supports the Robbery Finding

Appellant argues the evidence adduced at the jurisdictional hearing to support the juvenile court's robbery finding is insufficient because (1) there was no *admissible* evidence that property was taken from M.H.; (2) there was no evidence of taking *by force or fear*; and no evidence appellant personally took property from M.H. or aided and abetted its taking by someone else. We disagree.

In reviewing a claim of insufficiency of the evidence on appeal, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) We must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Ibid*.)

Evidence is substantial if it " ' "reasonably inspires confidence" ' " (*People v. Marshall* (1977) 15 Cal.4th 1, 34) and is "credible, and of solid value" (*id*. at p. 31). This standard of review applies with equal force to cases primarily supported by circumstantial evidence. As an appellate court, we "must accept logical inferences that the [trier of fact] might have drawn from the circumstantial

evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.) These principles also govern findings in juvenile delinquency proceedings. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Evidence is sufficient to support a robbery conviction or jurisdictional finding "if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of robbery beyond a reasonable doubt." (*People v. Huggins* (2006) 38 Cal.4th 175, 214.)

A. Hearsay

Here, the element of felonious taking was supported by Ms. Mattson's statements to the 911 operator that M.H. said "they took all his money" and that it was the cash he earned by recycling cans. Defendant does not contend this evidence was insufficient, if it was admissible. Instead, he argues "[i]t is highly questionable whether" M.H.'s statements fell within any hearsay exception. The juvenile court found M.H.'s statements came within Evidence Code section 1240, the exception to the hearsay rule for spontaneous statements, and we agree.

Evidence Code section 1240 provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." We review the trial court's ruling for abuse of discretion. (*In re Cindy L.* (1997) 17 Cal.4th 15, 35.) " 'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been made before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to

dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' " (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) " 'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*.' " (*Id.* at p. 319.)

Here, all the requisites for admission were met. M.H. was seen unharmed on the 7-Eleven's video a few minutes before 5:00 a.m. Seconds later, appellant and his confederates are seen around M.H. and a knife is flashed. At 5:00 a.m. M.H. presents himself to Ms. Mattson: he is badly beaten, his eye is swollen shut and he has been stabbed and, he claims, robbed of all his money. Ms. Mattson, startled by M.H., calls 911. For M.H., this was a startling event. The video evidence establishes M.H.'s utterances occurred mere minutes after the assault and robbery. He thought he was dying. Under these circumstances, the only rational inference to be drawn is that M.H.'s utterances were made under the stress of excitement and while his reflective powers were in abeyance. That conclusion is not altered by the 911 operator's questions. M.H.'s statement related to the stressful incident. We perceive no abuse of discretion.

For the same reasons, Ms. Mattson's statements relaying M.H.'s utterances to the 911 operator were independently admissible under Evidence Code section 1240 as spontaneous statements. She testified she was startled and taken by surprise by M.H.'s approach. His appearance at that hour and his bloody and beaten condition made her uncomfortable. She called 911 to get help. She had no conceivable reason or opportunity to contrive or misrepresent his statements, or her own observations, to the 911 operator. Again, the only rational inference is that she conveyed information about her observations and M.H.'s responses while under the stress of excitement and while her reflective powers were still in abeyance. Since her statements, too, qualify as

spontaneous statements under Evidence Code 1240, the juvenile court did not abuse its discretion in admitting evidence of the 911 call.

B. ***Confrontation***

Next, defendant argues that since M.H. did not testify, admission of his statements to the 911 operator violated the Sixth Amendment's confrontation clause as interpreted by *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and its progeny.[10] We disagree.

Crawford holds that "[t]he Confrontation Clause of the Sixth Amendment . . . bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant has had a prior opportunity for cross-examination.' " (*Davis v. Washington* (2006) 547 U.S. 813, 821 (*Davis*), citing *Crawford, supra,* 541 U.S. at pp. 53–54.) In *Davis,* the Supreme Court considered whether statements made to law enforcement personnel during a 911 call were " 'testimonial.' " (*Davis,* at p. 817.) In *Davis,* a woman reported to a 911 operator that " 'he' " was " 'jumpin' " on her again, using his fists. (*Ibid*.) The operator told the woman (McCottry), "I've got help started," and asked for the name of her attacker. "As the conversation continued, the operator learned that Davis had 'just r[un] out the door' after hitting McCottry . . . . McCottry started talking, but the operator cut her off, saying, 'Stop talking and answer my questions.' . . . She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was 'to get his stuff,' since McCottry was moving. . . . McCottry described the context of the assault, . . . after which the operator told her that the police were on their way. 'They're gonna check the area for him first,' the operator said, 'and

[10] Although appellant did not object to the admission of the 911 call on Sixth Amendment confrontation clause grounds, we believe he may make the "very narrow . . . argument on appeal . . . that the asserted error in admitting the evidence over his [hearsay] objection had the additional legal consequence of violating [the confrontation clause.]" (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

then they're gonna come talk to you.' . . . [¶] The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the 'fresh injuries on her forearm and her face,' and her 'frantic efforts to gather her belongings and her children so that they could leave the residence.' " (*Davis,* at p. 818.)

The *Davis* Court concluded McCottry's statements were not testimonial, and established the following general rule: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis*, *supra,* 547 U.S. at p. 822.)

We have no difficulty concluding the statements at issue here were not testimonial and were therefore admissible over a confrontation clause objection. Defendant concedes as much as to all statements except those relating to how much money had been taken, which he claims "crossed the boundary from non-testimonial into testimonial" because "[t]he police dispatcher was plainly seeking information about past events to establish guilt." We cannot agree. The 911 operator was simply seeking information to establish what had happened and to help police locate the culprits, who were still at large. Knowing how much money had been taken and whether it was in bills or coins could potentially assist police to zero in on the right suspects. Because the statements were not testimonial, there was no *Crawford* violation, and no need to establish M.H.'s unavailability. Unavailability is not a prerequisite to admission of spontaneous statements under Evidence Code section 1240, and "[t]he Sixth Amendment confrontation clause imposes no requirement of declarant unavailability as a prerequisite for admission of spontaneous declarations." (*People v. Dennis* (1998) 17 Cal.4th 468, 529.)

C. Force or Fear

Next, defendant argues there was no evidence that M.H.'s recycling money was taken by force or fear because even if M.H. "was injured by another person, it does not necessarily follow that his property was taken by force or fear" because "[o]ther scenarios are entirely plausible." The scenario suggested in the brief is premised on appellant's statement to the police that a "bum" offered him and his companions "weed" but then "disrespected" them by refusing to sell it because they were "bitches." At some point during the confrontation, the bum assumed a "kung fu" stance and threw something at them. "And then he was like, he tried to take off on us." The confrontation at the center of this scenario does not rule out a robbery. Nor was the juvenile court required to give appellant's testimony denying he robbed M.H. any credence.

The surveillance video established conclusively that a few minutes before 5:00 a.m. M.H. was unharmed. A few seconds later, he is surrounded by appellant and his confederates, and D.A. pulls out a knife. The surveillance footage also shows that both appellant and M.H. assumed fighting stances. As M.H. walks out of the frame at 4:54 he is being followed by appellant and the other two. Five minutes later, at 5:00 a.m. M.H., now bleeding and beaten about the face, encountered Ms. Mattson and asked for her help. He told her and the 911 dispatcher he "got jumped by these three guys"—three young Mexicans, two skinny and one fat—"and they stabbed him twice and punched him in the eye; took all his money." In addition, defendant had a $20 bill in his pocket when he was arrested, yet he provided conflicting accounts about how it came into his possession. He told police the Honda's driver threw the cash at him after the crash. On direct examination, he stated he had the $20 bill prior to the car crash. On cross-examination, he testified he actually had "over [$]60" that night, but spent some of it on alcohol before the crash. Given the short time frame between the events captured on the surveillance footage, M.H.'s injured state minutes later, his report of being assaulted and robbed, and appellant's prevarication about the money in his pocket, indicative of consciousness of

guilt, the juvenile court could reasonably infer that during the confrontation appellant admitted occurred, M.H. was separated from his money by force and fear. Indeed, no other rational inference presents itself. Evidence of force or fear was substantial.

D. *Aiding and Abetting*

Next, appellant argues the record is devoid of evidence he aided and abetted the robbery or the assault with a knife of M.H. In particular, he argues "no evidence was introduced tending to show that defendant/appellant had any knowledge of his cohort's use of a knife." This argument is evidently premised on appellant's denial he personally used the knife, or even knew about it, which the juvenile court rejected. "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) It is true that "in general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission." (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) Nevertheless, "[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.) In any event, "[w]hether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment." (*People v. Mitchell* (1986) 183 Cal.App.3d 325, 329.)

In addition to the surveillance video details described above, appellant admitted to police he was one of the three youths shown talking to the "bum" on the surveillance video, who disrespected him and his confederates, "tried to take off on us," and assumed a "kung fu" stance. Appellant was also still in the company of D.A. and Ortiz, wearing the same clothes, an hour later when they attempted to rob J.R. As noted above,

defendant had a $20 bill in his pocket when he was arrested, and gave conflicting accounts about how it came into his possession. From the sum total of the evidence, the juvenile court was entitled to draw the conclusion that appellant was no mere observer of the assault and robbery of M.H., but rather acted as a full-fledged participant in the attack, at a minimum facilitating and encouraging commission of the crime, by act or advice. Substantial evidence supports the robbery and assault findings.

II. Substantial Evidence Supports the Attempted Robbery Finding.

Appellant argues the evidence was insufficient to support the attempted robbery finding, because the would-be robbers' behavior, as described by J.R., was "equivocal." He asserts "[n]o one . . . brandished a weapon" and, in any event, "[i]t is far from clear [appellant] was the person who was bothering [J.R.]" since in court identifications are suggestive, D.A. had longer hair than appellant, D.A. had the knife and Officer Potter's testimony contradicted J.R. on whether he identified appellant at the scene. Plus, if appellant was not the person who confronted J.R., his intent to rob was in doubt, as he was very drunk, and as a mere "potted plant" in the back seat, he did nothing to aid and abet a robbery.

The juvenile court heard all the evidence and defense counsel's argument. Substantial evidence is found in the 911 call, in which J.R. described one of the persons who tried to rob him as the fat Mexican wearing glasses in the driver's seat. He identified that person at trial as appellant. We note appellant told police he "slapped off" his glasses during the car chase. Police photographed a pair of glasses on the front passenger seat. Other evidence supportive of the attempted robbery count is recited in the statement of facts and need not be repeated here. After hearing the evidence, the juvenile court found that J.R. was "a very good and excellent witness" whose "memory of these events [was] very compelling," while Officer Potter's testimony was not credible or convincing. Substantial evidence supports the attempted robbery finding.

III. Substantial Evidence Supports the Finding of Receiving Stolen Motor Vehicle (§ 496d, subd. (a)).

Next, appellant argues the juvenile court's finding he violated section 496d (receiving a stolen motor vehicle) must be reversed because "the evidence introduced did not match or relate to the charging documents, and the prosecution failed to produce substantial evidence of the crime charged." As appellant further explains in his reply brief, his complaint is not that "Count 4, on its face, did not state a claim. [¶] [It is that] Count 4 alleged a particular crime, and that the evidence adduced at trial did not prove the crime charged." He asserts this is a sufficiency of the evidence argument.

In this case, the petition alleged a violation of section 496d, subdivision (a), which provides: "Every person who *buys or receives* any *motor vehicle. . .* that *has been stolen or that has been obtained in any manner constituting theft* or extortion, *knowing the property to be stolen or obtained*, or who *conceals, sells, withholds, or aids in concealing, selling, or withholding any motor vehicle, . . . knowing the property to be so stolen or obtained*, shall be punished by imprisonment . . . or a fine . . ., or both." (Italics added.)[11] Since a 1992 amendment to section 496, it has been the law in this state that the actual thief can be convicted of violating section 496, but cannot be convicted of stealing and receiving the same property. (*People v. Allen* (1999) 21 Cal.4th 846, 861–862.)

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[11] Compare section 496: "(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170." In 1992, the Legislature amended the statute to add: "A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property." (Stats. 1992, ch. 1146, § 1, p. 5374.)

Specifically, the petition here alleged in the language of the statute that "[o]n or about October 18, 2014, minor(s) [J.S.] did commit a felony namely: RECEIVING STOLEN PROPERTY, MOTOR VEHICLE, a violation of Section 496d(a) . . . in that said minor did unlawfully *buy and receive* 1996 HONDA ACCORD . . . *that was stolen and had been obtained in a manner constituting theft* and extortion, *knowing the property to be stolen and obtained*, and *did conceal, sell, withhold, and aid in concealing, selling and withholding* said property." (Italics added.)

Appellant complains the evidence adduced at the jurisdictional hearing tended to show he stole the Honda with a shaved key, not that he "concealed, sold, withheld, or aided in concealing, selling or withholding" it. As a result, he was convicted of the crime charged in the petition on the basis of evidence that he committed a crime that was not charged in the petition, a violation of due process. We disagree.

"Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*In re Hess* (1955) 45 Cal.2d 171, 175.) Likewise, "due process requires that a minor, like an adult, have adequate notice of the charge so that he may intelligently prepare his defense." (*In re Arthur N.* (1976) 16 Cal.3d 226, 233, superseded by statute on another point, as stated in *John L. v. Superior Court* (2004) 33 Cal.4th 158, 186; *In re Gault* (1967) 387 U.S. 1, 33.) Thus, in juvenile delinquency cases, "a wardship petition under [Welfare and Institutions Code] section 602 may not be sustained upon findings that the minor has committed an offense or offenses other than one specifically alleged in the petition or necessarily included within an alleged offense, unless the minor consents to a finding on the substituted charge." (*In re Robert G.* (1982) 31 Cal.3d 437, 445.)

Here, the wardship petition alleged, among other things, that appellant "received" a stolen motor vehicle, "knowing" it was stolen. To sustain a petition alleging receiving stolen property, the People must prove (1) the property was stolen; (2) the defendant

knew the property was stolen; and (3) the defendant had possession of it. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425; *In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.) The following evidence adduced at the jurisdictional hearing, if believed, established all the requisite elements of receiving stolen property. The first element was established by the rightful owner's testimony that the car was stolen from him. Ample circumstantial evidence of the second element, knowledge, was provided by the following testimony: a car can be started with a shaved key; a car's motor can continue to run after the shaved key has been removed; appellant had a shaved key in his pocket when he was arrested; appellant had previously been arrested in connection with the crash of a stolen car with a shaved key in its ignition; and, on the prior occasion, appellant had given a similar explanation for his presence in a stolen car, which he claimed not to know was stolen. Evidence of the third element, possession, was established by J.R.'s testimony identifying appellant as the driver of the car whose occupants tried to rob him, and other evidence establishing he was arrested inside the car after the police chase and car crash.

The fact that the district attorney may have inartfully pleaded not only that appellant "received" the stolen 1996 Honda Accord, but also bought it, concealed it, withheld it, and aided in selling, concealing, and withholding the Honda, did not create a fatal notice problem or a due process violation. *People v. Feldman* (1959) 171 Cal.App.2d 15 (*Feldman*), cited by appellant, does not persuade us otherwise.

In *Feldman*, the defendant was the owner of an auto wrecking business. (*Feldman, supra*, 171 Cal.App.2d at p. 18.) McClerkin and others were dealers in stolen cars and auto parts. (*Ibid*.) The defendant agreed to sell McClerkin the valid license plates, pink slip, locks and identification belonging to a wrecked Mercury in his lot, knowing McCorkle wanted them for an identical stolen Mercury bought by McClerkin. (*Id.* at p. 19.) The defendant gave McClerkin the bill of sale to the Mercury and the stolen plates, parts and pink slip, while agreeing to dispose of the wrecked Mercury "for

his own benefit." (*Ibid*.) After McClerkin was arrested in connection with a different stolen car, the police went to the defendant's wrecking yard and saw the stripped Mercury. The defendant admitted to police McClerkin and his confederates " 'caught me in a moment of weakness.' " (*Id*. at p. 20.) The stolen Mercury was abandoned by McClerkin and later found. (*Ibid*.)

The indictment alleged the defendant " 'did advise and encourage the buying and receiving of a 1953 Mercury sedan automobile . . . which had been stolen, knowing the same to have been stolen.' " (*Feldman*, 171 Cal.App.2d at p. 22.) The court reasoned that evidence adduced at trial did not show the defendant received the stolen Mercury. "Since the crime of receiving stolen property congeals upon taking possession of that property with guilty knowledge [citations] . . . [citation] the fact that the McClerkins had accepted illegal possession of the car before appellant even met with them precludes the conclusion that guilt attaches to him on either of these scores." (*Id*. at p. 23.) Although the evidence showed defendant had concealed or aided in concealing stolen property, the *Feldman* court held the accusatory language in the pleading did not allege concealing stolen property and therefore did not give the defendant adequate notice he could be convicted of that offense. (*Id*. at pp. 23–24.) In other words, the accusatory pleading suffered from fatal under-inclusiveness.

The accusatory pleading here suffered from the opposite problem: nonfatal over-inclusiveness. As a result, it gave appellant notice of a myriad of ways in which he could be found in violation of the statute. That "defect in the pleading, however, is one of uncertainty only, and is waived by defendant's failure to demur." (*People v. Thomas* (1986) 41 Cal.3d 837, 843; *People v. Equarte* (1986) 42 Cal.3d 456, 459 [citing *Thomas*]; *People v. Johnson* (1963) 223 Cal.App.2d 511, 512–513.) The evidence showed appellant either stole the car himself or helped someone steal it, since he had the shaved key in his pocket. Either way, there was ample circumstantial evidence he also knew the car was stolen, and from his "use of the vehicle for a common criminal mission" (*People*

v. Land (1994) 30 Cal.App.4th 220, 228), his presence in the car during the attempted robbery as the driver, and as a passenger during the car chase and the car crash, the juvenile court was entitled to infer appellant was in constructive possession of the car. Substantial evidence supports the section 496d, subdivision (a) finding.

IV. The Court Did Not Abuse Its Discretion in Committing Appellant to the DJJ.

Appellant argues the juvenile court abused its discretion by committing him to the DJJ because the extensive defense evidence adduced at the disposition hearing demonstrated he would not benefit from the commitment. He also argues the court gave no "thought or weight" to the problem a DJJ commitment would pose to visitation between appellant and his mother, and "[t]o the extent that familial association and visitation is a fundamental right guaranteed by the United States Constitution, the juvenile court's failure to consider the subject at all was reversible error."

We review appellant's claims for abuse of discretion under the following standard: "The decision of the juvenile court may be reversed on appeal only upon a showing that the court abused its discretion in committing a minor to [DJJ]. [Citations.] An appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. [Citations.] In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law." (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.)

The dual purposes of the juvenile court law are "(1) to serve the 'best interests' of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and 'enable him or her to be a law-abiding and productive member of his or her family and the community,' and (2) to 'provide for the protection and safety of the public . . . .' " (*In re Charles G.* (2004) 115 Cal.App.4th 608, 614, quoting Welf. & Inst. Code, § 202,

subds. (a), (b), (d).) To that end, the juvenile court considers the probation officer's report and any other relevant and material evidence that may be offered (Welf. & Inst. Code, § 202, subd. (d)), as well as the age of the minor, the circumstances and gravity of the offense, the previous delinquent history, and other relevant and material evidence (Welf. & Inst. Code, § 725.5). The juvenile court is not required to discuss specifically each of these factors in making its decision, and it is sufficient if the record reflects that they were, in fact, considered. (*In re John F.* (1983) 150 Cal.App.3d 182, 185.)

A DJJ commitment is not an abuse of discretion where the record demonstrates "both a probable benefit to the minor . . . and the inappropriateness or ineffectiveness of less restrictive alternatives." (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396; *In re Pedro M.* (2000) 81 Cal.App.4th 550, 555–556, overruled on another point in *People v. Gonzales* (2013) 56 Cal.4th 353, 375, fn. 6.)

In arriving at its disposition, the juvenile court considered an abundance of evidence, starting with the supplemental disposition report. After "greatly consider[ing]" the Challenge Academy program favored by appellant and his mother, the probation department's screening committee tasked with recommending the most appropriate placement for appellant concluded the Challenge program "would not appropriately address the minor's significant substance abuse issues," partly because the sole substance abuse program was "interactive journaling" and partly because the program lasted only nine months. Noting that appellant had already received eight months of "high level" but ineffective "treatment services" during two stints at New Foundations, and the seriousness of appellant's current offenses, the committee did not believe nine months in the Challenge Program would "allow for a long enough commitment to address the minor's full rehabilitation." On the other hand, the committee believed commitment to DJF would be "the most appropriate recommendation" because "DJF will address the need for consideration of the gravity of the offense and risk to community safety with a lengthy period of removal from the community as well as all of the minor's rehabilitative

needs including significant substance abuse treatment, academic services, gang intervention and re-entry planning." The committee noted that appellant's mother reported she was "elderly" and would not be able to travel to visit appellant if he were committed to DJF. It also noted that appellant's performance on probation was "unsatisfactory," with new arrests, truancy, and positive drug tests, and that recent assessments suggested he was at high risk for reoffense.

The defense presented seven witnesses. Dr. Andrew Pojman, Ph.D., testified as an expert in adolescent psychology and diagnostic assessment. He interviewed and tested appellant at juvenile hall. He diagnosed appellant with posttraumatic stress disorder (PTSD) from being stabbed outside his home when he was 16 years old. In his view, appellant's alcohol abuse was the result of that condition. He did not believe appellant would benefit from a DJF commitment because he was more vulnerable and less aggressive than the typical DJF ward. Dr. Pojman recommended an inpatient program where appellant could be closely monitored but still have contact with his mother and family on a regular basis. Dr. Pojman was not particularly familiar with DJF's mental health services.

Emily Sparks, appellant's therapist at juvenile hall, testified she would continue to provide therapy to help appellant manage his PTSD symptoms if he were placed at an in-county facility. Vanessa Fortney, appellant's teacher at juvenile hall, testified he has taken a leadership role of assisting in class and is her teaching assistant, for which he received additional credit. He did not have an individualized educational plan, and she would not be his teacher at Challenge. Fairlight Hall, appellant's group counselor at juvenile hall, testified she had observed appellant to be respectful. However, he "hung out" with "known gang members" at juvenile hall and had been involved in two gang fights at New Foundations.

Nadia Hollomon, a senior probation officer, testified about the Challenge and New Foundations programs, which operate out of juvenile hall. Challenge does not accept

minors over the age of 18 because the program was designed to give minors "an opportunity to be able to complete the program prior to their 19th birthday. You don't want to house someone that's over 18 starting in the program that's already over 18, putting them in the program with minors." There has never been anyone in the Challenge program who started the program after his 18th birthday. The program is nine months long. Minors earn one point per waking hour. The program can be extended on an hour-by-hour or day-by-day basis to allow minors to make up points lost for bad behavior.

Daniel Macallair, Ph.D., the executive director of the Center of Juvenile and Criminal Justice, testified as an expert in disposition planning and his understanding of the Department of Juvenile Justice. He also works with the Positive Youth Justice Initiative program, which provides intensive services at the community level for "high-end offenders" in San Francisco as an alternative to DJF. He wrote a report and recommended that appellant "[u]tilize local resources."

The DJJ has been under the *Farrell* Consent Decree since 2004. (*Farrell v. Allen* (Super. Ct. Alameda County, No. RG 03079344).) In Macallair's view, DJF had not fully implemented the reforms arising out of ongoing litigation and court review, particularly with regard to mental health treatment, and it continued to have a violent and pervasive gang culture. It also lacked parole services. When a ward leaves the institution he becomes the responsibility of the county probation system. He acknowledged that DJF's "trauma focus cognitive behavioral treatment program" is "a good program" that has been implemented. Nevertheless, he would not recommend placing appellant at DJF because it would disrupt the continuity of services and connection to his community. He preferred a local placement for appellant such as Challenge because it was community-based and tied to local service agencies. He is not "a fan" of DJJ, and has never recommended a ward be placed there. He has only been asked to testify by the defense, and no defense attorney has ever asked him to recommend DJJ. He has turned down cases where he was unable to come up with "a livable alternative for a particular kid."

Appellant's mother testified that before his arrest, she depended on him to help with the rent and to act as an interpreter. He is her youngest child by six years and she loves him very much; she is very attached to him. She was currently living with one of her adult daughters, but that daughter was moving to Idaho in September. Besides appellant and the daughter she lives with, she has one adult child who lives near Santa Rosa, and the other ones live in Sacramento. The daughter she lives with had driven her to visit appellant at juvenile hall once. The other times she walked. She does not drive. She would not be able to visit him at DJJ because she has nobody to take her.

The prosecution called two witnesses. Doug Ugarkovich, a parole agent with the DJJ, is the community and court liaison for intake court services. According to Ugarkovich, the special master in the *Farrell* litigation was about to sign off on court oversight because DJJ was "currently 98 percent [in] substantial compliance" with the safety and welfare revisions imposed by the court. "[T]he only outstanding remedial plan we are still working on is mental health."

During the first 45 days at DJJ, a ward attends an in-house school in Stockton and undergoes a battery of tests to fully assess his psychological, medical, educational, and treatment needs. The goal is to develop a comprehensive, individualized treatment plan taking into account the ward's specific needs and criminal conduct record. Ugarkovich opined that about "95 percent" of the wards at DJJ have a "DSM-5" diagnosis. For those wards, staff "write a special referral" regarding "that mental health risk history." That special referral is reviewed by DJJ's "chief mental health clinician," who decides to place the ward in one of three levels of mental health services. DJJ had a special trauma-focused cognitive behavioral treatment program for wards with PTSD, depression, bipolar, and similar issues. Wards with dual diagnoses of substance abuse and mental health issues receive treatment for both.

According to Ugarkovich, DJJ has expanded visiting hours, offered more phone calls and held quarterly family events such as barbecues "at DJJ's dime" on Friday nights

so that families can visit over the weekend. Staff are available to network with families and provide information. "We want to engage the family."

Alan Cole, appellant's former probation officer, recommended a DJJ commitment based on the seriousness of the current offenses, appellant's pattern of criminal behavior, failure of prior interventions, and continued substance abuse. He considered the Challenge program to be primarily educational, lacking in substance abuse counseling, and too short to serve appellant's needs. In addition, he believed Challenge's mental health counseling was not as intensive as DJJ's.

In resolving "the debate" between the prosecution and the minor over whether "the best commitment" would be at Challenge or at DJJ, the court looked at appellant's history. The court noted that almost all of appellant's sustained petitions involved "either weapons or violence." It noted appellant had gone through "almost every program we have." The court identified appellant's main challenges as his "general criminality," as evidenced by the sustained petitions for weapons and violence; his substance abuse, which was an ongoing problem; his mental health, which appeared be a more significant issue now than previously; and his gang issues.

The court concluded that Rites of Passage, group home placement and New Foundations were too short to be helpful to him, and Challenge was not a drug treatment program and did not have the mental health facilities appellant needed. Based on everything the court had heard about DJJ, the court deemed it to "have the best programs to address [appellant's] problem; namely, the substance abuse and the mental health issues. Not to mention the criminality." The court pondered the conflicting evidence about the effect on wards of the gang entrenchment at DJJ but concluded gang problems existed in "our own juvenile hall. There is no evidence we don't have gang problems in Challenge. Challenge is a relatively new program. We only had a handful of graduates. And frankly the results have been mixed. . . . [H]earing all the evidence that I heard here seems to me [appellant] needs a program that is longer than nine months. And can

appropriately address his mental health and substance abuse problems. And the only program I think is available is DJF. [¶] And so that is what I will find to be the most appropriate placement for him."

Appellant decries the court's focus on his "criminality" as evidenced by the sustained petitions, but viewing the record as a whole we do not find that was the court's sole, or even primary, focus in choosing a DJJ commitment. The court took into consideration all of the evidence presented relating to appellant's various needs. Here, there was sufficient evidence in the record for the juvenile court to conclude that aside from the danger to the community posed by appellant's escalating and life-threatening misbehavior, his dual PTSD and substance abuse diagnoses required more attention and treatment in a secure rehabilitative environment than local options could provide.

One final point requires comment. Appellant argues that "before a California Juvenile court may commit a minor to DJJ, there must not only be evidence that the minor will benefit from the DJJ, and that less restrictive alternatives are inappropriate; there must also be a showing of compelling necessity should DJJ place the minor beyond the range of familial visitation." We disagree. *In re James R.* (2007) 153 Cal.App.4th 413 (*James R.*), on which appellant relies, is inapposite. It did not involve a commitment to the DJJ and therefore did not consider whether a third mandatory requirement should be engrafted upon existing law. The court in *James R.* held only that "the juvenile court unlawfully delegated all determinations regarding family visitation to a private therapeutic program. In so doing, the court abused its discretion and violated the constitutional separation of powers." (*Id.* at p. 418.)

Furthermore, assuming appellant has a "fundamental constitutional right to visitation by family members" (*James R., supra,* 153 Cal.App.4th at p. 417), this record does not demonstrate a violation of that right. The record shows that DJF has made significant efforts to foster visitation between wards and their families, including inviting families to come to sponsored Friday night events to encourage families to stay and visit

on the weekend. Appellant's mother's testimony acknowledged transportation to visit appellant would be difficult for her. However, mother had other family members who could be asked to provide transportation. Nor was any reason presented why public transportation should be ruled out. Appellant's right to familial visitation has not been violated on this record.

A commitment to the DJF is not an abuse of discretion where the record demonstrates "both a probable benefit to the minor . . . and the inappropriateness or ineffectiveness of less restrictive alternatives." (*In re Angela M., supra,* 111 Cal.App.4th at p. 1396; *In re Pedro M., supra,* 81 Cal.App.4th at pp. 555–556.) We conclude the record here provides substantial evidence of both requirements. Thus, the decision to commit defendant was a proper exercise of the court's discretion.

V. The Minute Order Must Be Corrected.

Appellant asks us to correct an error on "Judicial Counsel (*sic*) Form JV-723," which reflects appellant's maximum term of commitment as eight years four months, instead of the six years orally pronounced by the court. "Succinctly put, the juvenile court must consider the crime's relevant 'facts and circumstances' in determining whether the minor's maximum commitment period should be equal to or less than the maximum confinement term for an adult." (*In re Julian R.* (2009) 47 Cal.4th 487, 495.) However, the court is not required to orally pronounce the maximum period of confinement since the Judicial Council's revised commitment form "requires the juvenile court both to state the duration of the maximum period of confinement and to acknowledge that it has 'considered the individual facts and circumstances of the case in determining the maximum period of confinement.' " (*Id.* at p. 498.)

In this case the court did orally pronounce the maximum term of confinement and its reasons therefor. "The maximum period of confinement I am going to set at 6 years for the following reasons: The maximum term of the 211 in this case is 5 years. Subordinate terms, . . . 8 months for the initial gun offense . . . and 4 months for the

possession of brass knuckles offense. Plus the 5 years gets you to 6 years . . . . [I]n analyzing the other counts here, the assault with a deadly weapon, I would find him to be 654 to the 211. [¶] The attempted robbery . . . I would run concurrent. The possession of a stolen vehicle . . . run concurrent. Find the maximum period of confinement to be 6 years . . . . [¶] I also find that . . . although the Court has discretion to go anywhere from the maximum period of 8 years . . . down to something below the 3 years, of course, the Court has broad discretion. It is not restricted to the triad that we use in adult court. I find 6 years to be the appropriate term to address the rehabilitative requirements for [appellant], to maintain community safety, and give DJF enough time to do the programming as required. [¶] . . . [¶] Court designates the maximum period of physical confinement to be—and I already said it. Six years. *The other maximum period* could have been 8 years 4 months. Although, actually I believe it is 7 years 4 months because of the 654 count." (Italics added.)

For the purpose of determining the longest term which could be imposed on an adult for the same offenses pursuant to Welfare and Institutions Code section 726, the court may in its discretion aggregate terms, both on the basis of multiple counts, and on previously sustained Welfare and Institutions Code section 602 petitions. "When aggregating multiple counts and previously sustained petitions, the maximum confinement term is calculated by adding the upper term for the principal offense, plus one-third of the middle term for each of the remaining subordinate felonies or misdemeanors." (*In re David H.* (2003) 106 Cal.App.4th 1131, 1133–1134.) "The applicability of Penal Code section 654 is properly determined by the juvenile court that adjudicates and sustains a petition against a youth." (*Id.* at p. 1137.) The court retains the discretion to run the terms consecutively or concurrently. (*In re Jesse F.* (1982) 137 Cal.App.3d 164, 168.)

The upper term for second degree robbery is five years. (§ 213, subd. (a)(1)(B).) One-third the midterm for aggravated assault is one year. (§ 245, subd. (a).) Possession

of a concealable firearm by a minor is a "wobbler" punishable as a felony at the discretion of the juvenile court. (*In re Jose T.* (1997) 58 Cal.App.4th 1218, 1221.) One-third the midterm for a "wobbler" is eight months. Possession of brass knuckles is punishable as a misdemeanor by one year in the county jail. (§ 21810.) One-third of that is four months. One-third the midterm for attempted robbery is eight months. (§ 213, subd. (a)(2)(b).) One-third the midterm for receiving stolen vehicles is also eight months. (§ 496d, subd. (a).) Since the court determined section 654 barred multiple punishment for the aggravated assault charge, the longest term which an adult could serve for the same offenses is seven years four months, as stated by the court.

The Judicial Council form JV-732 in this record has two boxes under the general heading "Confinement Period." One is for "[t]he maximum period of confinement," and one for the maximum period of confinement "[p]er 731(c) W & I." The first box reflects a maximum period of confinement of eight years four months. The second box reflects that after the court's consideration of the "individual facts and circumstances of the case in determining the maximum period of confinement," per Welfare and Institutions Code section 731, subdivision (c), "the minor is committed to 6 years."

Appellant maintains both boxes should reflect six years. We disagree. For the reasons discussed above, the only error we perceive is that the first box should reflect that the maximum period of confinement which an adult could serve for the same offenses is seven years four months—which is what the juvenile court said—instead of eight years four months. " 'Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.' " (*People v. Morelos* (2008) 168 Cal.App.4th 758, 768.) We will therefore order the JV-732 form to be corrected.

DISPOSITION

The juvenile court is ordered to correct the JV-732 form to reflect a maximum term of commitment of seven years four months instead of eight years four months. In all other respects, the juvenile court's orders are affirmed.

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DONDERO, J.

We concur:

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HUMES, P. J.

_____
MARGULIES, J.